(5)

No. 84-782

In The

Supreme Court of the United States

October Term, 1984

STATE OF SOUTH CAROLINA, *et al.*,
Petitioners,

v.

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT TRIBE'S SUPPLEMENTAL BRIEF

DON B. MILLER
Counsel of Record
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, CO 80302
(303) 447-8760

JEAN H. TOAL
BELSER, BAKER, BARWICK, RAVENEL, TOAL & BENDER
1213 Lady Street, Suite 303
Columbia, SC 29211
(803) 799-9091

ROBERT M. JONES
123 Workman Street
Rock Hill, SC 29730
(803) 324-2988

MIKE JOLLY
RICHARD STEELE
113 West Main Street
Union, SC 29379
(803) 427-8471

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INTRODUCTION

On May 8, 1985, the Solicitor General of the United States, at the Court's invitation, expressed the view that the Court should grant the Petition for a Writ of Certiorari. This brief is filed pursuant to the Court's Rule 22.6 in response to new issues raised by the United States.

DISCUSSION

I. Under The United States' View, Even If The Court Were To Grant The Petition And Reverse The Fourth Circuit's Ruling On Applicability Of State Statutes Of Limitations, The Tribe Would Still Possess Significant Land Claims.

Because South Carolina, alone among the state jurisdictions, does not permit tacking of successive periods of possession by adverse occupants in order to establish title pursuant to its 10-year statute of limitations, S.C. Code Ann. § 15-3-340 (Law Co-op. 1977), an 18-year delay under South Carolina law would not establish even a presumption of title. Indeed, the United States concedes that application of state statutes of limitations to the Tribe's claim might not immediately resolve the underlying controversy (Br. at 17, 20).

South Carolina law is clear. As the foremost commentator on South Carolina property law has observed:

> The rule in this state, contrary to the view of the overwhelming majority of jurisdictions, is that even though there may be privity by deed or devise between successive adverse occupants of the land, the possession of such occupants cannot be tacked to make out title by adverse possession under the statute of limitations.

D. Means, *Survey of Property Law*, 10 S.C.L.Q. 90 (Fall 1958). Professor Means' statement is supported by an

unbroken line of South Carolina Supreme Court decisions. *See Adams v. Adams,* 220 S.C. 131, 66 S.E.2d 809 (1951); *Haithcock v. Haithcock,* 123 S.C. 61, 115 S.E. 727, 729 (1928) ("A man cannot tack, in order to make ten years, . . . the ten years must be in himself alone, or by way of inheritance." Quoting with approval trial judge's jury charge); 7 R. Powell, *The Law of Real Property,* ¶ 1014[2] at 91-63 (1984).

In *Crotwell v. Whitney,* 229 S.C. 213, 92 S.E.2d 473, 477 (1956), the South Carolina Supreme Court stated plainly that the adverse occupant has the burden of establishing possession for the entire 10-year statutory period without tacking:

> Plaintiffs having established their legal title to the premises, appellant['s] . . . claim of title by adverse possession required proof of actual, open, notorious, hostile, continuous, and exclusive possession by him, or by one or more persons through whom he claimed, for the full statutory period of ten years, *without tacking of possession* except by descent cast. Code 1952, Sections 10-2421, 10-124 [now codified as §15-3-340]; . . . (citations omitted, emphasis added).

See Gregg v. Moore, 226 S.C. 366, 85 S.E.2d 279, 281 (1954) ("The burden of proof of adverse possession is on the party relying thereon . . ."). Thus, in order to defeat the Tribe's claim of title, each defendant would be required to prove open, hostile, notorious and continuous possession for a 10-year period.[1]

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[1]It is also certain that under South Carolina law, those defendants against whom the claim was not barred by the 10-year statute of limitations could not invoke the equitable defense of laches. "Laches within the period of the statute of limitations is no defense at law." Crotwell v. Whitney, *supra,* 92 S.E.2d at 478.

The United States attempts to sidestep the obvious implication of South Carolina's unique law. It characterizes the district court's finding that the anti-tacking rule has no relevance as an apparently reasonable interpretation of South Carolina's law (Br. at 18, n. 18). However, because the district court (a Pennsylvania judge sitting by designation) simply adopted the entirety of defendants' proposed findings of fact and conclusions of law *verbatim,* its interpretation of South Carolina law should be accorded little deference. *See United States v. El Paso Natural Gas Co.,* 376 U.S. 651, 656-57 (1964). The consistent line of South Carolina Supreme Court decisions demonstrates that South Carolina's anti-tacking rule and the 10-year statute of limitations are inextricably linked: the 10-year limitations period contained in S.C. Code Ann. § 15-3-340 may be asserted only by an adverse possessor who has been in possession for at least 10 years. *Crotwell v. Whitney, supra;* Note, *Effect of Disability of Landowner With Respect to the Acquisition of Adverse Rights by Another by Statutes of Limitations, Presumption of a Grant, and Prescriptive Right in South Carolina,* 10 S.C.L.Q. 292, 298 (Winter 1958); *see* 7 R. Powell, *supra,* ¶ 1012[2] at 91-4 ("The theory upon which adverse possession rests is that the adverse possessor may acquire title at such time as an action in ejectment by the record owner would be barred by the statute of limitations.").

Nonetheless, the United States urges the Court to hear the case because a reversal would "presumably . . . substantially settle much of the uncertainty . . . and would conclusively determine the title question as regards at least substantial portions of the land." (Br. at 19, 20).

Implicit in the Solicitor General's argument is the recognition that a reversal of the Fourth Circuit would not resolve the claim to substantial portions of the land, *i.e.*, the lands of "some owners of homes and other property in the claims area [who] have not personally been in possession for the 10 years necessary to obtain title by adverse possession." (Br. at 18).

Counsel for the Tribe estimates that if the South Carolina statute of limitations were to apply, the Tribe would retain its claims to up to 40% of the land in the claim area.[2] It is difficult to envision how public policy would be served by a decision resulting in continuing tribal claims against only those landowners who, by happenstance, had been in possession of their land for less than ten years when the case was filed in 1980. The United States' view of the 1959 Act would presumably bar

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[2]It is admittedly difficult to project with certainty the number of landowners within the claim area who had been in possession for 10 or more years when the suit was filed in 1980. The Rock Hill area has experienced substantial growth, however, in the period between 1960 and 1980. United States Census figures for Rock Hill and York County reveal the following:

	1960 pop.	1970 pop.	% Change ('60-'70)	1980 pop.	% Change ('70-'80)
York County	78,760	85,216	8.2%	106,720	25.2%
Rock Hill	29,404	33,846	13.1%	50,846	50.2%

Source: U.S. Census, South Carolina General Population Characteristics, Table 13 (1960); Table 42-40 (1970); Tables 42-7 and 42-11 (1980). It is logical to infer, therefore, that a very substantial amount of real estate has changed hands in the claim area in the 18-year period between 1962 and 1980, especially considering that the vast majority of York County's growth, like all of Rock Hill's growth, has taken place within the claim area.

tribal claims against many of the larger, more established property owners, while leaving the brunt of the litigation to be borne by the more numerous smaller landowners. Moreover, each defendant in the claim area would have the burden of presenting his own proof of open, notorious, hostile and continuous possession in order to establish that the Tribe's claim to his parcel was barred; and the Tribe might well be forced to proceed separately against each individual landowner. Many, if not all, of the benefits of class action litigation would be lost.

Thus, the United States' objectives of settling uncertainty and finalizing the title question would not be served. Probably a majority of the 27,000 members of the putative defendant class do not occupy lands that have been in their possession for 10 of the 18 years preceding filing of the suit in 1980. Rather than moving the case toward an orderly and equitable resolution, adoption of the United States' view of the 1959 Act would result in chaos.

This is plainly a matter that should be resolved by Congress. If the petition is denied and the case proceeds to the merits, Congress will undoubtedly enact settlement legislation.

II. The Fourth Circuit Correctly Construed The 1959 Act: The United States' Interpretation Would Result In An Implicit, Indirect Termination Of A Treaty Reservation.

For purposes of their motion to dismiss, which was based solely on the effects of the 1959 Act, defendants assumed that neither the Tribe's property interest nor its federally-protected status as an Indian Reservation

were validly disturbed until 1959. Thus, for purposes of this motion, the lands within the claim area constituted a federally-protected Indian Reservation in 1959—any attempted prior conveyance being void under the Non-Intercourse Act and federal common law. *County of Oneida v. Oneida Indian Nation,* No. 83-1065 (Mar. 4, 1985) (*Oneida* II). While the United States concludes that the 1959 Act did not extinguish the Tribe's property interest (Br. at 6-8), it argues that it nonetheless made state law applicable to the 1763 Treaty Reservation. If state law has been made applicable, and federal restrictions removed, then the land's status as an Indian Reservation has been terminated.

This Court has repeatedly held that Congressional termination of reservation status "must be expressed on the face of the act or be clear from the surrounding circumstances or legislative history. . ." *Mattz v. Arnett,* 412 U.S. 481, 504-5 (1973); *Solem v. Bartlett,* — U.S. —, 79 L.Ed.2d 443, 450 (1984). In this case, however, Congress made no specific mention of terminating the protected status of the 1763 Treaty Reservation. Congress did make plain, however, its specific intent to terminate the small reservation acquired administratively in 1945 (Br. in Opp. at 6). To conclude that Congress, without mention, also intended to terminate the 1763 Treaty Reservation, violates the principle that Congress must use explicit language to terminate an Indian Reservation.

Such a conclusion is likewise inconsistent with the United States' own recognition that the 1959 Act "should be construed in light of the tribal resolution . . . expressing the desire that 'nothing in this legislation shall affect the status of any claim against the State . . . by the . . .

Tribe' ", as well as the fact that the "Catawba Act was drafted to carry out the intent of the resolution." (Br. at 8, n. 7). On the one hand, the United States argues that the Fourth Circuit was correct in applying the canons of construction requiring plain and unambiguous Congressional intent to extinguish Indian title (Br. at 7), and that it was likewise correct in looking to the legislative history and surrounding circumstances to determine the title extinguishment and tribal existence issues (Br. at 8, n. 7, 8). But in its analysis of the application of state law issue, the United States does an about-face and argues that only the language of the Act itself should be considered—notwithstanding that Congress "quite likely" did not consider the effect of the Act on the Tribe's claim (Br. at 14), and that "Congress' focus in this case [was] on the 1943 Memorandum of Understanding." (Br. at 15).

The harsh result urged by the United States permits virtually an entire treaty reservation to simply fall through the cracks. But Congress does not deal with valuable Indian property rights in so cavalier a fashion, particularly where, as here, it purported only to be acting for the Tribe's benefit. If Congress had intended to permit the application of state statutes of limitations to the tribal claim, in abrogation of tribal desires and the assurances to the Tribe by the Bureau of Indian Affairs and the bill's sponsor (Br. in Opp. at 4-6), it would have surely provided explicit notice to the Tribe that it would have only a certain period of time in which to assert its claim. When Congress intends to apply statutes of limitations to old Indian claims, it does so expressly and takes great pains to ensure that the rights of tribes are pro-

tected. *See* 28 U.S.C. § 2415; *Oneida* II, slip op. 14-16. To construe the 1959 Act as urged by the United States, particularly when the United States, as trustee, assured the Tribe that the Act would not affect the claim, would be "at the least, a sorry breach of faith with these Indians." *Squire v. Capoeman,* 351 U.S. 1, 10 (1956).

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

DON B. MILLER
Counsel of Record
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, CO 80302
(303) 447-8760

JEAN H. TOAL
BELSER, BAKER, BARWICK, RAVENEL,
TOAL & BENDER
1213 Lady Street, Suite 303
Columbia, SC 29211
(803) 799-9091

ROBERT M. JONES
123 Workman Street
Rock Hill, SC 29730
(803) 324-2988

MIKE JOLLY
RICHARD STEELE
113 West Main Street
Union, SC 29379
(803) 427-8471